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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Alliance for Public	)	RM 9244
Technology Requesting Issuance of Notice	)	CCB/CPD 98-15
Of Inquiry and Notice of Proposed	)	
Rulemaking to Implement Section 706 of	)	
The 1996 Telecommunications Act	)	

REPLY COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these reply comments regarding the petition submitted by the Alliance for Public Technology ("APT") on February 18, 1998 [hereinafter "APT Petition"]. In its petition, APT asked the FCC to issue a Notice of Inquiry and a Notice of Proposed Rulemaking to implement Section 706 of the Telecommunications Act of 1996 ("1996 Act").

In these reply comments, CompTel will address APT's proposal that the FCC act now to establish a schedule phasing out portions of the unbundled network element ("UNE") requirements in Section 251(c)(3), as well as Section 251(c) in its entirety. APT Petition at 19-22. Various incumbent local exchange carriers ("ILECs") predictably, if somewhat tepidly, supported APT's proposal. E.g., Comments of U S West at 7-9; Ameritech Comments at 6. CompTel strongly opposes APT's proposal as being contrary to the statute and empirically groundless.

At the outset, CompTel wishes to emphasize that its decision to focus upon APT's sunset proposal does not imply that CompTel acquiesces in APT's other proposals. To the contrary, while CompTel endorses APT's call for the FCC to initiate a proceeding to implement Section 706 by adopting rules that will help make advanced telecommunications capabilities reasonably available to all Americans, CompTel strenuously disagrees with many of APT's proposals for

achieving that objective. CompTel already has addressed the crux of those proposals in its opposition to the petitions submitted by Bell Atlantic, U S West and Ameritech regarding Section 706 of the 1996 Act. See Opposition of the Competitive Telecommunications Association, CC Docket Nos. 98-11, 98-26 & 98-36, filed April 6, 1998 ("CompTel Opposition"). CompTel will not repeat that discussion here, but rather attaches a copy of that opposition and incorporates it into the record by reference.

APT urges the FCC to adopt sunset rules for Section 251(c)(3) because "[t]here is now no end in sight to the UNE/TELRIC regulatory scheme." APT Petition at 19. It is difficult to fathom APT's desire to specify a terminal date for statutory requirements with which the ILECs so far have totally failed to comply. As such, APT's request is akin to the Bell Companies seeking to remove the line-of-business restrictions in the AT&T consent decree "almost before the ink was dry on the decree." United States v. Western Electric Co., 673 F. Supp. 525, 601 (D.D.C. 1987). The FCC and the industry should focus their efforts first and foremost upon ensuring that competitors can obtain reasonable, non-discriminatory access to UNEs at cost-based prices for the provision of local and long distance services before considering whether it would be appropriate to adopt a sunset for Section 251(c)(3) specifically or Section 251(c) generally. See WorldCom Comments at 11-12.

As a legal matter, the FCC cannot implement APT's sunset proposal because the 1996 Act prohibits the FCC from exercising its forbearance authority to remove the requirements of Section 251(c) "until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d).[1] At this point in time, it would be sheer speculation for the FCC to hazard a

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[1] CompTel previously demonstrated to the FCC that Section 706 of the 1996 Act does not constitute an independent grant of forbearance authority. See CompTel "706" Opposition at 9-14.

guess as to when, if ever, forbearance could be considered for the UNE regime under Section 251(c)(3). APT itself concedes that it would be "unlawful" for the FCC at this time to "specify some future date for definite termination" of Section 251(c). APT Petition at 21. If it is unlawful to adopt a sunset for Section 251(c) generally, then it is unlawful to do so for Section 251(c)(3) specifically.

Further, it would be impossible for the FCC to make the determinations today that are necessary to justify exercising its forbearance authority. In particular, the FCC cannot forbear from applying a statutory requirement unless it determines that enforcing the requirement is not necessary to ensure reasonable and non-discriminatory rates and practices, to protect consumers, or to promote the public interest. 47 U.S.C. §§ 160(a)(1)-(3). The FCC also must determine whether forbearance would promote competitive market conditions. Id., § 160(c). Clearly, forbearance from applying any provisions in Section 251(c) cannot be justified until the ILECs comply fully with Section 251(c)(3) *and* local competition under the 1996 Act is fully assured. That obviously is not the case today, and there is no way for the FCC to predict when, if ever, that might occur. APT itself concedes that "[t]here is no way now to forecast when . . . competition will exist on the local level." APT Petition at 19. APT's sunset proposal is premature, possibly by a decade or more.

APT's avowed purpose in proposing sunset rules is to create incentives for competitive carriers to invest in infrastructure that could be used to provide advanced telecommunications services. However, that approach is squarely contrary to the legislative scheme underlying Section 251(c). Congress established the mandatory UNE regime because it recognized that it would be impractical and inefficient to expect new entrants to rely entirely upon their own facilities to enter the local market broadly. APT's proposed sunset rules would overthrow that

fundamental Congressional goal and thwart the development of meaningful local competition through the entry mechanisms devised by Congress. E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15670-71 (¶340) (1996) (limiting access to UNEs to entrants who have or build their own facilities would deter competitive entry contrary to statutory language and congressional intent).

Further, the record in CC Docket Nos. 98-11, 98-26 and 98-36 shows that investment from all industry sectors is occurring at a record pace without such incentives. Therefore, as an empirical matter, APT has shown no need to adopt sunset rules to ensure adequate investment in high-capacity broadband networks.

Moreover, APT's sunset proposal would create perverse incentives. The ILECs already have delayed complying with Section 251(c) for more than two years while they engage in a prolonged series of litigations over the statute, agency rules, and arbitrations. The sunset rules proposed by APT would only strengthen the ILECs' resolve to avoid complying with the 1996 Act. It is not inconceivable that the ILECs could fight compliance all the way until the sunset rules took effect. Therefore, the principal result of sunset rules would be renewed efforts by the ILECs to game the current administrative and judicial system to avoid complying with the 1996 Act as long as possible.

In addition, APT's sunset rules would act as a high entry barrier to carriers who desired to enter the local market primarily or exclusively through UNEs. Such carriers would be understandably reluctant to enter the local market if it was uncertain how long they could obtain UNEs at cost-based prices under the 1996 Act. Carriers would not wish to invest significant capital into a business plan for local market entry, only to have the rug pulled out from

underneath them by the subsequent removal of the statutory UNE regime pursuant to APT's proposed sunset rules. In order to provide the business and regulatory certainty necessary to encourage competitive local entry, the FCC should decline to even consider sunset rules at this time.

Further, APT's sunset rules would discourage entry even among those carriers who plan to build their own facilities to provide local services. Many competitive entrants are devising business plans that rely upon their own network facilities and UNEs as inter-related mechanisms for entering the local market to compete against the ILECs. Those entrants are willing to serve certain customers through their own facilities, but only if they can serve other customers through UNEs. The carriers may plan to migrate many customers from UNEs to their own facilities when it becomes efficient to do so, while the carriers may view UNEs as the most efficient serving arrangements for certain customers on a permanent basis. By casting doubt upon the ability of new entrants to rely upon UNEs as a local entry vehicle, a sunset for Section 251(c)(3) would deter many potential competitors from entering the local market or building new facilities to serve that market. Viewed from this perspective, APT's sunset rules would discourage the very infrastructure investment it claims to desire to promote.

APT's suggestion that the FCC should adopt a sunset for switches, but not loops, also does not withstand scrutiny. The premise of APT's suggestion is that competitors may now purchase switches from competitive vendors. APT Petition at 20. However, it was not the lack of sufficient switches at competitive prices that prompted Congress to require ILECs to make local switching available as an unbundled network element. The problem is that new entrants may not have the traffic volume to justify purchasing and installing an entire switch to serve customers in one or more areas. In those circumstances, it is essential that new entrants have the

ability to purchase unbundled switching from ILECs at reasonable, non-discriminatory rates. APT's sunset proposal for local switching would create a significant barrier to entry by preventing new entrants from serving rural, residential and other areas where they may not have sufficient traffic volume to justify installing their own switches.

Lastly, with respect to its proposal to establish a sunset for Section 251(c), APT suggests that all it has in mind is to ensure that the FCC rigorously evaluate the need for that regime at periodic intervals. APT Petition at 21-22. With all due respect, CompTel submits that no such rule is needed. If their past litigious behavior is any indication, the ILECs can be relied upon to press the case for removing Section 251(c) as industry and market circumstances change. The only value in mandatory periodic reviews would be if the ILECs were prohibited from submitting forbearance requests during the intervals, which would minimize the onerous burden on the FCC and the industry from having to respond to multiple, overlapping forbearance requests on a rolling basis.

Respectfully submitted,

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DUPLICATE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Bell Atlantic Corporation	)	**CC Docket No. 98-11**
For Relief From Barriers To Deployment	)	
Of Advanced Telecommunications Services	)	
	)	
Petition of U S West Communications, Inc.	)	**CC Docket No. 98-26**
For Relief from Barriers to Deployment	)	
Of Advanced Telecommunications Services	)	
	)	
Petition of Ameritech Corporation	)	**CC Docket No. 98-36**
To Remove Barriers to Investment in	)	
Advanced Telecommunications Capability	)	

OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

Using a broom labeled "Section 706," Petitioners seek to sweep aside the most significant competitive legislation of this generation. However, both the factual and legal premises are sorely lacking for such a radical result.

The market already is responding to the demand for data services, and is doing so at an extraordinary pace. Scores of providers – including companies like WorldCom, Qwest, and IXC Communications – are investing billions of dollars in state-of-the-art fiber optic transmission facilities, SONET and OC-x architectures, and deploying advanced, nationwide data networks at record speeds. Even the BOCs are, by their own admission, "aggressive[ly] exten[ding]" their networks to satisfy demand for data services. In fact, Bell Alantic's recent announcement that it would expend $1.5 billion to upgrade its data network capabilities demonstrates that no changes are needed in BOC regulation to encourage the deployment of advanced telecommunications capabilities.

Moreover, the FCC lacks the legal authority to provide most of the relief requested in the BOC Petitions. The Commission has no authority to excuse the BOCs from fulfilling their obligations under Section 251(c) or from Section 271's interLATA entry conditions, and, even if it could, doing so would have devastating effects on the ability of new entrants to compete in local and advanced telecommunications services. The BOCs' attempts to avoid Section 10's limitations on the FCC's forbearance authority must fail because Section 706 cannot be read as an independent grant of authority to exercise "regulatory forbearance." Indeed, under the BOCs' reasoning, Section 706 would *also* grant the FCC independent authority to adopt "measures that promote competition in the local telecommunications market" irrespective of Section 251's requirements. Using this new-found unrestricted authority, therefore, the FCC would be free to

require TELRIC pricing, combinations of UNEs, "pick and choose" rights, and any other action it can justify under the public interest standard. This patently cannot be what Congress intended in asking the FCC to conduct an inquiry into the deployment of advanced telecommunications capabilities pursuant to Section 706.

Similarly, the BOCs' "alternatives" such as defining a global data LATA, rewriting the separate affiliate requirements, or granting nondominant carrier status are directly in conflict with the Act and FCC precedent. The Commission should reject these measures summarily.

The 1996 Act is intended to create a pro-competitive environment for all telecommunications services, including advanced data services. In order to reach these goals, the Act specified certain obligations that the BOCs must comply with in order to make their networks available on an equal and non-discriminatory basis. The BOCs should stop trying to evade these obligations and should fulfill them promptly and faithfully. If and when they do, consumers of all services, including data services, will be the beneficiaries.

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For Relief From Barriers To Deployment	)	
Of Advanced Telecommunications Services	)	
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Petition of U S West Communications, Inc.	)	**CC Docket No. 98-26**
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	)	
Petition of Ameritech Corporation	)	**CC Docket No. 98-36**
To Remove Barriers to Investment in	)	
Advanced Telecommunications Capability	)	

OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following consolidated opposition to the above-referenced Petitions filed by Bell Atlantic Corporation, U S West Communications, Inc. and Ameritech Corporation (collectively, the "BOC Petitions").[1] Citing Section 706(a) of the Telecommunications Act of 1996, the BOC Petitions request forbearance from Sections 251 and 271 of the Communications Act, as amended, and other actions, allegedly in order to remove "barriers to deployment of advanced telecommunications services." However, not only do the Petitions request actions that

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[1] Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services (filed Jan. 26, 1998) (*Bell Atlantic Petition*); Petition of U S West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services (filed Feb. 25, 1998) (*U S West Petition*); Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability (filed March 5, 1998) (*Ameritech Petition*). The

(continued...)

are unnecessary and potentially devastating to competition in advanced services, but the Commission is without authority to grant the core of the relief requested in the Petitions – forbearance from Sections 251 and 271 of the Act.

I. INTRODUCTION

Using a broom labeled "Section 706," Petitioners seek to sweep aside the most significant competitive legislation of this generation. However, both the factual and legal premises are sorely lacking for such a radical result. The market already is responding to the demand for data services, and is doing so at an extraordinary pace. Scores of providers – including companies like WorldCom, Qwest, and IXC Communications – are investing billions of dollars in state-of-the-art fiber optic transmission facilities, SONET and OC-x architectures, and deploying advanced, nationwide data networks at record speeds. And as long as customers continue to demand better and faster data transmission capabilities, there is no end in site to these types of investment.

Nor is it true that the Act's local competition initiatives are leaving the BOCs behind in deploying advanced capabilities. Bell Atlantic – one of the Petitioners before the Commission – just last week announced it was embarking upon an $1.5 billion "aggressive extension" of its network to meet data demands, even without removal of the barriers it claims are preventing just such actions today.[2] Clearly, a carrier that is "aggressive[ly] exten[ding]" its network to the tune of $1.5 billion can hardly complain of insurmountable barriers to investment. Moreover, Bell

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(...continued)

Commission consolidated the pleading cycles for the three petitions. *See Order*, DA 98-0513 (by Chief, Policy and Program Planning Div., Com. Car. Bur. Mar. 16, 1998).

Atlantic, U S West and Ameritech already have the most powerful incentive to deploy advanced services -- the need to respond to the billions of dollars being invested by other carriers today. The Commission need not sweeten the pot to satisfy threats that the BOCs will not keep pace with competitors.

In reality, the BOCs' Petitions are not about advanced data services at all. They are yet another entry in a growing list of BOC attempts to subvert their obligations under the 1996 Act. But the Commission has no authority to excuse the BOCs from fulfilling their obligations under Section 251(c) and satisfying Section 271's conditions for interLATA authorization, even if it were a good idea to do so (which it is not). Section 10(d) expressly forbids such action in the clearest terms, and an uncodified provision of the same legislation cannot be read to render that limitation a nullity. Similarly, "alternatives" such as defining a "global data LATA" or rewriting the separate affiliate requirements directly contradict the Act and FCC precedent. The FCC must reject these efforts to lower the bar set in the Act. The BOCs can and must open their networks to competitors; and consumers of all services, including data services, will be the beneficiaries when and if they do.

For these reasons, the BOCs' Petitions should be denied.

II. THE MARKET ALREADY IS RESPONDING TO BURGEONING DEMAND FOR BROADBAND DATA SERVICES WITHOUT THE RELIEF REQUESTED IN THE PETITIONS

Although there is no question that demand for high-speed data transmission capabilities has skyrocketed, the Petitions' claim that the BOCs – and only the BOCs – can meet this demand

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(...continued)

[2] "Bell Atlantic Plans Outlay for Upgrade," *Wall Street Journal*, March 31, 1998, at B5 (quoting Lawrence T. Babbio, president and CEO, Bell Atlantic Network Group).

cannot be further from the truth. To the contrary, as Commissioner Ness noted recently, "every major player in the communications world is heavily invested" in advanced telecommunications services, particularly Internet-related applications.[3] In fact, not only are scores of providers – including Frontier, Qwest, IXC Communications and others – making significant investments, but even Bell Atlantic is "aggressive[ly] exten[ding]" its data network in response to marketplace conditions.[4] Market incentives are working to encourage the deployment of the advanced telecommunications services described in the Petitions; the FCC need not and should not radically undermine the Act in the name of creating additional such incentives for the BOCs.

A. The Exponential Growth of Data Services is Driving Investment at Extraordinary Levels

No one contests that demand for high-speed data services, including Internet-related applications, is skyrocketing. Services such as integrated services digital network ("ISDN"), frame relay and asynchronous transfer mode ("ATM") that were rare only a few years ago are increasingly becoming commonplace. Customers now use frame relay and other technologies to share files among offices, to allow multiple organizations to use or edit joint documents, and to provide increased access to information. Every major CLEC offers some or all of these data services to customers today, and the demand for them continues to grow.

Growth in the Internet has been even more pronounced. The number of host computers sharing information across the Internet increased 10 fold in the five years preceding 1997, and is

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[3] Remarks of Commissioner Susan Ness before the WashingtonWeb Internet Policy Forum, Feb. 9, 1998, <http://www.fcc.gov/Speeches/Ness/spsn803.html.>

[4] *See, supra,* n.2.

said to be doubling roughly every year.[5] The number of users on the Internet doubled in 1995, and is commonly estimated to exceed 50 million subscribers today.[6] This growth is expected to continue into the foreseeable future as well. Some analysts estimate that the Internet market will exceed $23 billion by the year 2000.[7]

As Commissioner Ness noted, there is no shortage today of entities seeking to satisfy consumer demand for advanced telecommunications facilities and services. One need look only at the following (nonexhaustive) examples to understand the scope and depth of such investments:

Qwest Communications: Qwest is building a 16,000 mile fiber optic network expected to be completed in mid-1999. Qwest's network will serve over 125 cities in the United States with SONET facilities utilizing OC-192 transmission links. As of March 4, 1998, Qwest had completed nearly 3,750 route miles, stretching from Los Angeles to Cleveland and from Dallas to Houston.[8] Qwest recently announced a $4.4 billion merger with LCI International, Inc., establishing it as one of the largest interexchange providers for business and residential customers.

WorldCom: In 1995, WorldCom acquired over 11,000 route miles of fiber optic facilities from WilTel. WorldCom has continued to expand its fiber optic facilities, and today, through its UUNET subsidiary, WorldCom is one of the leading providers of Internet backbone capacity.

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5 *Digital Tornado: the Internet and Telecommunications Policy*, at 16, 21, OPP Working Paper Series (March 1997).

6 *Id.* at 21.

7 *Id.*

8 Press Release: *Qwest Lights Network to Cleveland*, <http://www.qwest.net/press/030498.html>

WorldCom launched a $300 million upgrade and expansion of this network last year.[9]

IXC Communications: IXC has deployed a nationwide SONET-based network with OC-X capability. IXC states that its network offers speeds up to OC-12, sufficient for carrying high-speed, bandwidth-intensive data services.[10] Through 1997, IXC had completed approximately 5,500 miles of a planned 18,000 nationwide network of high-speed fiber facilities.[11]

Frontier Corporation: Frontier Corporation has completed nearly one-third of a planned 13,000 nationwide SONET network designed to carry IP data, fax, and voice applications.[12] Frontier's President and CEO, Joseph P. Clayton commented that, "The Frontier network was designed for data – from the fiber in the ground, to the network electronics and the integrated DMS 500 switches."[13]

Williams Companies: Three years after selling its nationwide fiber optic network to WorldCom, Williams has reentered the wholesale telecommunications market. In February 1998, Williams announced it would expend $2.7 billion to build a 32,000 mile fiber optic system by 2001.[14] Williams stated that it would connect 69 cities to its new network in 1998, with over

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9 *WorldCom Announces $300 Million Expansion of Unet Network, High Demand for Internet Services Drives Major Expansion*, PR Newswire, available in Westlaw USNEWS database (Feb. 19, 1997).

10 Press Release: *IXC Communications Takes Industry Lead in Coast-to-Coast High-Capacity Transmission*, <http://www.ixc-investor.com/02-10-98.html.>

11 Reinhardt Krause, "Will Telecom Firms Gain on Steady Diet of Fiber?" *Investors Business Daily*, p. A8, March 3, 1998 (hereinafter *Fiber Diet*).

12 Press Release: *Frontier Takes Next Step in Executing Data Strategy*, PR Newswire, available in Westlaw USNEWS database (Mar. 25, 1998).

13 *Id.*

14 Press Release: *Williams Accelerates Expansion of Fiber-Optic Network; Plans $2.7 Billion Investment in 32,000-mile System by 2001*, <http://www.twc.com/news/rel156.html>.

100 cities connected upon completion of the network.[15]

Level 3 Communications: Headed by former MFS CEO James Crowe, Level 3 plans to build a 20,000 mile fiber optic network employing TCP/IP protocols.[16] Level 3 states that it has raised $2.5 billion to construct its network.[17]

With these and other providers moving rapidly to satisfy demand for data services, market forces are fully capable of providing the advanced data communications that the BOC Petitions describe.

B. Grant of the Requested Relief Would Impede Competition in Data Services, Not Promote it

Over the past decade, the BOC Petitioners– like most other ILECs – have been transforming their networks, replacing old, analog facilities with digital facilities for aggregating, transmitting and routing telecommunications traffic. During this time, they have completely rebuilt their interoffice networks, replacing virtually all of their interoffice transport facilities with fiber optic cable. These fiber optic facilities are capable of transporting any kind of digital signal, whether it is circuit switched or packet switched, narrowband, wideband or broadband. In fact, the use to which optical fiber cable is put is determined entirely by the electronic equipment that originates and terminates the transmission over the facility. It is therefore technically impossible to segregate interoffice transport facilities according to the network characteristics defined in the Petitions.

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15 *Id.*

16 *Fiber Diet*, at A8.

17 *Id.*

A similar transformation is occurring in the local loop. The BOCs increasingly are deploying new technologies in the loop, including Digital Loop Carrier ("DLC") and Digital Subscriber Line ("DSL"). These loop technologies place high capacity fiber or coaxial cable in portions of the loop, and condition the remaining twisted pair wire to handle high capacity transmissions. As with interoffice transport facilities, these technologies allow local loop facilities to be used for is circuit switched or packet switched, narrowband, wideband or broadband applications.

As a result, an exemption for BOC "data" services would be impossible to control and would grant the BOCs virtual carte blanche to avoid their Section 251 obligations simply by turning on and off the electronics in their network. This type of a regulatory scheme would have two consequences. First, the BOCs would have every incentive to convert the most attractive customers to "advanced" services immune from Section 251, while leaving undesirable customers to languish on an outdated and crumbling POTS system. Second, it would do nothing to reduce the BOCs' control over essential telecommunications facilities, particularly the local loop – the "last mile" over which all telecommunications services must travel. If they were allowed to deny access to facilities they had converted to "advanced" services, the BOCs could leverage their current local monopoly to capture a dominant position in advanced telecommunications services as well. Competitors would lose their right to obtain access to local loops that the BOC had converted to "advanced" services, thereby denying competitors the ability to offer an alternative service to the customer. Accordingly, the relief sought not only is unnecessary, but would be devastatingly counter-productive as well.

III. THE RELIEF REQUESTED EXCEEDS THE COMMISSION'S AUTHORITY AND IS CONTRARY TO THE ACT

One central theme of the BOC Petitions is the claim that if only they were freed from the meddlesome obligations of Sections 251(c) and 271, the BOCs would deploy all sorts of advanced technologies in their networks. As a quid pro quo for their response to marketplace demand, the BOCs implore the Commission to insulate them from the pro-competitive components of the Act, open a back door to Section 271 interLATA authorization, and grant them other preferential treatment undoing the Act's safeguards. However, the Petitioners fail to overcome the clear statutory language and precedent that precludes the FCC from doing what they ask.

A. The FCC Has No Authority To Forbear From Section 251(c)'s or Section 271's Minimum Standards

Section 10 of the Communications Act gives the FCC – for the first time – authority to forbear from applying provisions of the Communications Act, provided certain standards are met. 47 U.S.C. § 160(a). At the same time that Congress granted this newly-created authority, it carefully circumscribed its use. Specifically, Section 10(d) states:

> Except as provided in Section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

47 U.S.C. § 160(d). This provision clearly and unequivocally precludes the Commission from granting the relief sought in the Petitions. The FCC cannot excuse the BOCs from the interconnection, unbundling and resale provisions of Section 251, or alter the entry conditions of Section 271, unless and until the BOCs first fully implement those sections. After that, *but only after that*, the FCC has discretion to decide if Section 10(a)'s criteria can be met by forbearing

from portions of Sections 251 or 271.

To reinforce the importance of initial compliance, Congress included in Section 271 a complementary prohibition on FCC actions to lower the bar to interLATA authorization. Section 271 establishes the conditions upon which a BOC may provide in-region interLATA services, including a requirement that the BOC have "fully implemented" a 14-point "competitive checklist" in the state that is the subject of the application. To ensure the FCC remained faithful to the checklist's requirements, Section 271(d)(4) states:

> LIMITATION ON COMMISSION.—The Commission may not, *by rule or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

47 U.S.C. § 271(d)(4) (emphasis added). With this clear language, Congress underscored the importance of the enumerated conditions for interLATA authorization. Because the FCC may not expand or contract the checklist "by rule *or otherwise*," it follows that the FCC is *not* free to "forbear" from some or all of the Section 271 requirements and allow the BOCs to provide an in-region interLATA service upon a lesser showing, or no showing as the BOC Petitions request.[18]

Of course, the BOCs do not make an attempt to justify forbearance under Section 10.[19] Instead, they contend that Section 10 – and Section 10(d) – are irrelevant because in an uncodified portion of the 1996 Act, Congress allegedly granted the FCC *additional* and

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[18] Of course, the legislative history for such a straightforward prohibition serves only to reinforce its clear purpose. In discussing Section 271(d), the Conference Report stated that it adopted the basic structure of the Senate Report, while adding the state-by-state application procedure. H.R. Conf. Rep. 104-458. 104th Cong., 2d Sess. 149 (1996). The Senate Report, in turn, makes clear that: "[t]he Commission is specifically prohibited from limiting or extending the terms of the 'competitive checklist.'" *Id*, at 144. The Senate Report makes that statement not once, but twice. *Id*, at 145.

[19] Nor do they mention Section 271(d)'s limitation at all.

unlimited forbearance authority.[20] In the name of promoting "advanced telecommunications services," the BOCs argue, the FCC can do almost anything, including undercut the core provisions of the Act. But Section 706 cannot bear near the weight the BOCs place on it.

The BOCs rely on the following language for the argument that Section 706 independently grants forbearance authority:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) *by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.*[21]

Congress' reference to "regulatory forbearance" is just that – a reference. Section 706 merely *lists* regulatory methods (including forbearance) the Commission may "utiliz[e]" to promote the goal of advanced telecommunications deployment. The list does not independently grant any authority, but merely identifies possible options the FCC could consider. Indeed, the generality of the enumerated items on the list, the absence of rules or conditions for their use, and the catch-all phrase "or other regulating methods," underscore the illustrative nature of the Section 706 list.

The Conference Report's discussion of Section 706 supports the text's clear and unambiguous meaning. The thrust of the section, the Report makes clear, is to ensure "that advanced telecommunications capability is promptly deployed by requiring the Commission to *initiate and complete regular inquiries* to determine whether advanced telecommunications

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[20] Bell Atlantic Petition at 6, 10; U S West Petition at 36 n.15, 39; Ameritech Petition at 14 n.23.

capability, particularly to schools and classrooms, is being deployed in a 'reasonable and timely fashion.'" H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 210 (emphasis added). The focus of the Report's discussion is on the Commission's inquiry, not its ability to act after conducting such inquiry. In fact, the Conference Report makes no mention of the scope of this novel forbearance authority that the BOCs allege is granted. Given that the courts had concluded prior to the 1996 Act that the FCC did not possess such authority,[22] one would expect that if Congress were granting such new-found authority it would have said so. Instead, the Conference Report only discusses the *procedure* for reviewing deployment of advanced telecommunications capabilities and instructs the Commission to act, if necessary, upon completion of such a review. It is the inquiry, not the authority, that Congress mandated in Section 706.[23]

Indeed, if the BOCs' interpretation of Section 706 were correct, a number of illogical conclusions would follow. If references to the "regulating methods" in Section 706 are grants of authority as the BOCs claim, then Congress created not one, but *four* such grants. Under the BOCs' interpretation, Section 706 would also provide independent FCC authority – bounded only by the "public interest, convenience, and necessity" -- to employ "price cap regulation," "measures that promote competition in the local telecommunications market," and "other regulating methods that remove barriers to infrastructure." But if this were true, the Eighth Circuit's decision would be moot, for the

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(...continued)

21 Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56, § 706(a) (1996) (emphasis added).

22 *MCI Telecom. Corp. v. AT&T*, 114 S. Ct. 2223, 2232-33 (1994).

23 If Section 706 had been intended to provide new authority to the Commission, one would have expected the Section to be codified in 47 U.S. Code, along with the rest of the provisions relating to FCC authority to act. The fact that Section 706 is not codified strongly indicates that no new authority was contemplated by this provision.

Commission would have ample authority to require TELRIC pricing, combinations of UNEs, and pick and choose rights (or any other pro-competitive initiative) under its authority to adopt "measures that promote competition in the local telecommunications market." Indeed, the FCC would have almost complete freedom under Section 706 to regulate local services in any way and to any extent, provided the FCC could support a public interest finding.[24]

Moreover, Section 706 would, under this reading, endow not only the FCC with such authority but also "each State commission with regulatory jurisdiction over telecommunications services." But if individual states were free to override federal mandates, it would make a mockery of the Supremacy Clause and a century of preemption jurisprudence. Section 706 cannot be read to have such far-reaching results.

Similarly, the BOCs' attempts to limit Section 10(d) are unpersuasive. The Petitions claim that the phrase "under subsection (a) of this section" in Section 10(d) somehow transformed Section 706's instruction to encourage the deployment of advanced telecommunications capabilities and to conduct inquiries into a specific grant of authority to the FCC to override the explicit obligations of Sections 251(c) and 271. No explanation is offered for why Congress would be so magnanimous with its forbearance authority under Section706 but so protective of it under Section 10. It would be highly unusual, to say the least, to conclude that Congress took care to articulate a new forbearance authority in Section 10 of the Act – identifying four criteria for its exercise and prohibiting certain exercises of the authority—but at the very same time created an additional authority elsewhere in the Act to engage in "regulatory

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[24] Similarly, the "grant" of authority to use "other regulating methods" would have no discernable substantive limitation.

forbearance" bounded only by "the public interest, convenience and necessity." Such a self-contradictory position is so implausible that it "should be adopted only as a last resort." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 12 FCC Rcd 8653, ¶ 40 (1997). In fact, Section 10(d)'s reference to forbearance "under subsection (a)" demonstrates that Congress understood Section 10(a) to be the only provision authorizing forbearance. The Act refers to petitions "under" Section 19(a) because that is the provision that gives the FCC such authority. In other words, the language presumes that if a party were to petition the Commission for any form of forbearance relief, it would do so under the section specifically designed for requesting regulatory forbearance, *i.e.*, Section 10(a). The BOCs cannot escape the Act's prohibition on exercising forbearance authority with respect to Sections 251 and 271 by petitioning outside of Section 10.

B. Other Relief Requested is Contrary to the Act and FCC Precedent

Undoubtedly aware of the weakness of their requests for forbearance from Sections 251(c) and 271, the BOCs offer three potential "alternatives" the Commission might adopt: (1) redefine LATA boundaries to create a single "global data LATA," (2) forbearance from Section 272's separate affiliate requirements, and (3) grant of nondominant status to the BOCs in their provision of data services. Each of these alternatives are directly contrary to the Act and FCC precedent.

1. LATA Boundaries

The Petitions request that the Commission create a "global data LATA" or modify (*i.e.*, eliminate) existing LATAs for the defined purpose of encouraging the speedier development of

high-speed broadband and packet switched services.[25] This, as the Commission already has recognized in its *U S West LATA Order*,[26] is no alternative. The BOC LATA "relief" proposals unabashedly seek to scale back the BOCs' longstanding interLATA restrictions and, thus, grant of the BOCs' requests would impermissibly lower Section 271's interLATA standards. The Commission rightly concluded in its *U S West LATA Order* that "[t]he Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been fully implemented."[27]

The BOCs have offered no compelling reason why the Commission should stray from the path chosen by Congress. A clear path for removal of interLATA restrictions already exists. If the BOCs want to free themselves of interLATA restrictions in the advanced services market – or in any other telecommunications market – they first need to demonstrate compliance with Section 271. The BOCs simply cannot render Section 271 moot by defining away the LATA.

2. Separate Affiliate Requirements

Offering little in the way of support other than a not-very-compelling "Congress just got it wrong" argument, Ameritech and (apparently) Bell Atlantic also request forbearance from or modification of the separate affiliate safeguards of Section 272 and the Commission's rules

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25 Ameritech Petition at 12-13 (asking the Commission to modify the definition of LATA to establish a single global LATA for provisioning of non-circuit switched data services and facilities); Bell Atlantic Petition at 3 (seeking permission to provide high-speed broadband services "without regard to present LATA boundaries").

26 *Petition for Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, DA 97-767 (rel. Apr. 21, 1997) (*"U S West LATA Order"*).

27 *U S West LATA Order* at ¶ 26.